

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

AGUSTIN MARTINEZ-LOPEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. When conducting their substantive-reasonableness review of sentences, can appellate courts reweigh the sentencing factors in 18 U.S.C. § 3553(a), as the First, Eighth, Ninth, and Eleventh Circuits hold, or does this Court's decision in *Gall v. United States*, 552 U.S. 38 (2007), prohibit appellate courts from reweighing the sentencing factors, as the Fifth and Tenth Circuits hold?
- II. What is the appropriate standard for appellate courts to apply when conducting their substantive-reasonableness review of sentences?

PARTIES TO THE PROCEEDINGS

All parties to the petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.¹

¹ In the courts below, Petitioner Agustin Martinez-Lopez was also known by the aliases listed in the caption in Appendix A.

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PRAYER

Petitioner Agustin Martinez-Lopez (“Mr. Martinez-Lopez”) prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Martinez-Lopez’s case is attached to this petition as the Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit’s judgment and opinion was entered on December 30, 2019. *See* Appendix. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

DIRECTLY RELATED PROCEEDINGS

There are no other state or federal proceedings “directly related” to the case in this Court. *See* Sup. Ct. R. 14.1(b)(iii).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3553. Imposition of a sentence

- (a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
 - (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
 - (3) the kinds of sentences available;
 - (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

- (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced[;]
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

Mr. Martinez-Lopez pleaded guilty to illegally reentering the United States in violation of 8 U.S.C. § 1326(a) and (b). At sentencing, the district court calculated the advisory Sentencing Guidelines imprisonment range as 15 to 21 months, based on a criminal history category of II and a total offense level of 13. The court imposed an above-Guidelines sentence of 36 months' imprisonment, to be followed by a three-year term of supervised release. Counsel for Mr. Martinez-Lopez objected that the sentence was greater than necessary to achieve the statutory purposes of 18 U.S.C. § 3553(a). The court overruled the objection, and Mr. Martinez-Lopez timely appealed.

On appeal Mr. Martinez-Lopez argued that the 36-month sentence represents a clear error in judgment in balancing the sentencing factors, and is therefore substantively unreasonable, because when imposing that above-Guidelines sentence the district court gave undue, significant weight to the needs for the sentence imposed "to protect the children in this country" from further crimes by him and/or to afford adequate deterrence to criminal conduct. Mr. Martinez-Lopez pointed out that this was his first illegal-reentry conviction and that, unlike his prior offense of indecency with a child, which occurred a long time ago (in 2004), the instant illegal-reentry offense did not involve a child; he was simply "encountered by United States Border Patrol agents near Falfurrias, Texas." Nothing in the record, he observed, suggests that he committed any other offense involving a child, or that his illegal-reentry offense was a continuation of his earlier, more serious criminal behavior.

Mr. Martinez-Lopez next pointed out that, contrary to the district court's finding that he "clearly" has "no filter on these inclinations" (to abuse children), the presentence investigation report stated: "The defendant reported no history of mental or emotional health related problems and this investigation has revealed no information to indicate otherwise." Mr. Martinez-Lopez then argued that a lesser sentence falling within the advisory Guidelines range (as recommended by the government at sentencing) would be sufficient, but not greater than necessary, in light of the factors set forth in 18 U.S.C. § 3553(a).

The Fifth Circuit affirmed the sentence in an unpublished opinion, stating:

The presentence investigation report, taking into account Martinez' prior-aggravated-felony offense of indecency with a child, recommended a Guidelines sentencing range of 15- to 21-months' imprisonment. Stating it had considered Martinez' criminal history, the need to protect the public (especially children), and the need to deter future criminal conduct, the [district] court varied upward and sentenced Martinez to, *inter alia*, 36-months' imprisonment, to which Martinez objected.

Martinez has not asserted the court failed to consider the 18 U.S.C. § 3553(a) sentencing factors or included an irrelevant or improper factor. Along that line, both the need to protect the public and the need to deter future criminal conduct are proper factors to be considered in sentencing. *See* 18 U.S.C. § 3553(a). ***Martinez' challenge is simply a disagreement with the court's balancing of the § 3553(a) factors and does not show an abuse of discretion.***

United States v. Martinez-Lopez, No. 19-40368, slip op. at 2-3 (5th Cir. Dec. 30, 2019) (unpublished) (Appendix) (emphasis added).

Mr. Martinez-Lopez now seeks to have this Court settle a circuit split on how courts of appeals should review sentences for substantive reasonableness.

**BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT**

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals have adopted divergent approaches to substantive-reasonableness review of sentences.

Congress has instructed district courts, when imposing sentence, to consider the sentencing factors listed in 18 U.S.C. § 3553(a). Appellate courts review those sentences, as established by this Court in *Gall v. United States*, 552 U.S. 38 (2007), first for procedural reasonableness and then for “[t]he substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Gall*, 552 U.S. at 51. Since *Gall*, the courts of appeals have struggled with defining the scope of substantive-reasonableness review and have adopted divergent interpretations of the standard.

The Fifth Circuit, in Mr. Martinez-Lopez’s case as in others, has made clear that it will not entertain an argument that the district court erred in balancing the § 3553(a) factors. *See, e.g., United States v. Malone*, 828 F.3d 331, 342 & n. 42 (5th Cir. 2016); *United States v. Hernandez*, 876 F.3d 161, 167 (5th Cir. 2017); *Martinez-Lopez*, No. 19-40368, slip op. at 2-3 (Appendix); *United States v. Guerrero-Saucedo*, 779 Fed. Appx. 264, 265 (5th Cir. 2019) (unpublished); *United States v. Vazquez-Chavarria*, 777 Fed. Appx. 777, 778 (5th Cir. 2019) (unpublished); *United States v. Rosales*, 776 Fed. Appx. 260, 261 (5th Cir. 2019) (unpublished); *United States v. Thompson*, 757 Fed. Appx. 408, 410 (5th Cir. 2019) (unpublished); *United States v. Robertson*, 744 Fed. Appx. 237, 238 (5th Cir. 2018) (unpublished). The Fifth Circuit will “not reweigh the § 3553(a) factors” because, in its view, *Gall* forbids it. *United States v. Romero*, 621 Fed. Appx. 303, 304 (5th Cir. 2015) (unpublished) (citing *Gall*, 552 U.S. at 51-52); *see also Malone*, 828 F.3d at 342 & n. 42

(same); *Guerrero-Saucedo*, 779 Fed. Appx. at 265 (same); *Vazquez-Chavarria*, 777 Fed. Appx. at 778 (same); *Rosales*, 776 Fed. Appx. at 261 (same); *Thompson*, 757 Fed. Appx. at 410 (same); *United States v. Rivera-Solis*, 733 Fed. Appx. 207, 207 (5th Cir. 2018) (unpublished) (same, citing *Malone*); *United States v. Zuniga-Navarra*, 667 Fed. Appx. 448, 449 (5th Cir. 2016) (unpublished) (same).

The Tenth Circuit takes the same approach as Fifth Circuit. It will “not examine the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them.” *United States v. Solis-Alvarez*, 563 Fed. Appx. 622, 626 (10th Cir. 2014) (unpublished) (quoting *United States v. Smart*, 518 F.3d 800, 808 (10th Cir. 2008)). Like the Fifth Circuit, the Tenth Circuit views *Gall* as barring that inquiry. See *Smart*, 518 F.3d at 807-08 (citing *Gall*).

By contrast, the Eleventh Circuit’s substantive-reasonableness review expressly includes reweighing the § 3553(a) factors:

[E]ven though we afford due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance, we may find that a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably yields an unreasonable sentence. ***We are therefore still required to make the calculus ourselves, and are obliged to remand for resentencing if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors*** by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.

United States v. McQueen, 727 F.3d 1144, 1156 (11th Cir. 2013) (emphasis added) (quoting *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008)). And, contrary to Fifth and Tenth Circuits’ interpretation of *Gall*, the *en banc* Eleventh Circuit has concluded

that *Gall* “actually confirms that appellate courts, with the proper measure of deference, should review the reasonableness of the weight placed on a § 3553(a) factor by the sentencing court.” *United States v. Irely*, 612 F.3d 1160, 1192 n.18 (11th Cir. 2010) (*en banc*).

The First, Eighth, and Ninth Circuits have adopted approaches that are similar to the Eleventh Circuit’s. The First Circuit invites appellants to “persuade us that the district judge was unreasonable in balancing pros and cons despite the latitude implicit in saying that a sentence must be ‘reasonable.’” *United States v. Madera-Ortiz*, 637 F.3d 26, 30 (quoting *United States v. Navedo-Concepción*, 450 F.3d 54, 59 (1st Cir. 2006)); *see also* *United States v. Ofray-Campos*, 534 F.3d 1, 43 (“While the factors identified by the court may have justified a substantial upward variance, they simply do not support the imposition of a statutory maximum sentence of forty years, that is so far above the guidelines range.”).

The Eighth Circuit considers whether the district court committed a clear error of judgment in weighing appropriate factors. *United States v. Feemster*, 572 F.3d 455, 561 (8th Cir. 2009) (*en banc*); *see also* *United States v. Martinez*, 821 F.3d 984 (8th Cir. 2016) (holding that “the district court gave undue weight to Martinez’s violent past to justify its extreme deviation from the guideline range”).

And the Ninth Circuit will reverse a sentence as substantively unreasonable if the court’s review of the record leaves it with a “definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors.” *United States v. Ressay*, 679 F.3d 1069, 1087 (9th Cir. 2012) (*en banc*).

(quoting *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009)); *see also* *Ressam*, 679 F.3d at 1087 (rejecting the dissent’s position that the appellate court’s reweighing of the sentencing factors violates *Gall*).

In addition to this circuit split, the Fourth, Sixth, and Seventh Circuits have adopted a different approach to substantive reasonableness review. They focus on the reasons given by the district court and evaluate whether those reasons are sufficiently compelling to support the sentence. *See United States v. Howard*, 773 F.3d 519, 530 (4th Cir. 2014) (determining “whether the district court’s proffered justification for imposing a non-guidelines sentence is sufficiently compelling to support the degree of the variance”) (quoting *United States v. Abu Ali*, 528 F.3d 210, 261 (4th Cir. 2008)); *United States v. Aleo*, 681 F.3d 290, 300 (6th Cir. 2012) (determining “if the district court provided compelling reasons” for a sentence that went “so far beyond the guidelines range”); *United States v. Bradley*, 675 F.3d 1021 (7th Cir. 2012) (determining “whether the district court offered justification ‘sufficiently compelling to support the degree of variance’”).

The Third Circuit shares the focus on the district court’s reasons, but with a twist. A sentence that passes procedural review is substantively reasonable in the Third Circuit “unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.” *United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (*en banc*).

Finally, under the Second Circuit’s unique interpretation of *Gall*, the Second Circuit will “not consider what weight we would ourselves have given a particular factor,” but the

court will consider “whether a factor relied on by a sentencing court can bear the weight assigned to it.” *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (*en banc*); *see also United States v. Jenkins*, 854 F.3d 181, 187 (2d Cir. 2017) (“We conclude that the factors upon which the district court relied . . . cannot bear the weight of the sentence the district court imposed.”).

The Court should grant Mr. Martinez-Lopez’s petition for certiorari to resolve these divergent, and inconsistent, approaches to substantive reasonableness review. *See* Sup. Ct. R. 10(a).

II. This Court has provided the courts of appeals with very little guidance on how to conduct their important substantive reasonableness review.

As mentioned above, the Court in *Gall* established a bifurcated process of appellate review of federal sentences. First, the appellate court considers whether the sentence is procedurally reasonable. *Gall*, 552 U.S. at 51. This component of the review process was well-defined by the Court in *Gall*, which delineated “significant procedural errors” of “failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence.” *Id.*

If a sentence passes procedural evaluation, the appellate court then considers whether the sentence is substantively reasonable. *Id.* But the Court’s decision in *Gall* provided much less guidance on the scope of substantive-reasonableness review than it did on procedural-reasonableness review, to the point where one court of appeals has characterized *Gall* as providing “mixed messages.” *United States v. Levinson*, 543 F.3d 190, 197 (3d Cir. 2008); *see also Feemster*, 572 F.3d at 462 n.4 (quoting *Levinson*). Another commentator has observed that the Court’s lack of guidance on substantive reasonableness review has left “courts in the same indeterminate muddle as before” *Gall*. Laura I. Appleman, *Toward a Common Law of Sentencing: Gall, Kimbrough, and the Search for Reasonableness*, 21 Fed. Sent’g Rep. 1, 3 (2008). Yet another (a Third Circuit judge) has lamented, “Ultimately, it seems that the limited definition of reasonableness review outlined by the Supreme Court has created more questions than answers, particularly in the realm of substantive reasonableness.” D. Michael Fisher, *Still in*

Balance? Federal District Court Discretion and Appellate Review Six Years After Booker, 49 Duq. L. Rev. 641, 652 (2011).

In fact, the Sentencing Commission has also acknowledged the struggle of the courts of appeals to implement substantive-reasonableness review: “The appellate courts lack adequate standards and uniform procedures in spite of a number of Supreme Court rulings addressing them, and the ultimate outcome of the substantive review of a sentence may depend in part on the circuit in which the appeal is brought.” United States Sentencing Commission, *Report of the Continuing Impact of United States v. Booker on Federal Sentencing* (2012), available at <http://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing>.

Because of the lack of adequate standards, “a troubling consensus is emerging that substantive reasonableness review is unworkable or even undesirable.” Note, *More Than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 Harvard L. Rev. 951, 951 (January 2014); see also *id.* at 958 (“The workability of substantive reasonableness review has been the subject of withering criticism from the bench, the academy, and the Sentencing Commission itself.”).

Accordingly, the Court should grant Mr. Martinez-Lopez’s petition for certiorari to provide much needed guidance on the important question of how courts of appeals should review prison sentences for substantive reasonableness. See Sup. Ct. R. 10(c).

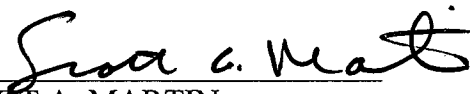
CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari to resolve the circuit split on the important question of how courts of appeals should review sentences for substantive reasonableness.

Date: January 27, 2020

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-40368
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

December 30, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

AGUSTIN MARTINEZ-LOPEZ, also known as Agustin Martinez, also known as Agustin L. Martinez, also known as Augustin Lopez Martinez,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:18-CR-1421-1

Before BARKSDALE, HAYNES, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Agustin Martinez-Lopez challenges his above-Guidelines sentence of, *inter alia*, 36-months' imprisonment imposed following his guilty-plea conviction for illegal reentry after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(2). He asserts his sentence was substantively unreasonable because the court made a clear error in judgment by considering the nature of his prior

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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state-court conviction and giving undue weight to the need to protect the public and to deter future criminal conduct.

Although post-*Booker*, the Sentencing Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008).

As noted, Martinez does not claim procedural error, only that his sentence is substantively unreasonable. In that regard, his above-Guidelines sentence is substantively unreasonable if it “(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors”. *United States v. Smith*, 440 F.3d 704, 708 (5th Cir. 2006) (citations omitted).

The presentence investigation report, taking into account Martinez’ prior-aggravated-felony offense of indecency with a child, recommended a Guidelines sentencing range of 15- to 21-months’ imprisonment. Stating it had considered Martinez’ criminal history, the need to protect the public (especially children), and the need to deter future criminal conduct, the court varied upward and sentenced Martinez to, *inter alia*, 36-months’ imprisonment, to which Martinez objected.

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Martinez has not asserted the court failed to consider the 18 U.S.C. § 3553(a) sentencing factors or included an irrelevant or improper factor. Along that line, both the need to protect the public and the need to deter future criminal conduct are proper factors to be considered in sentencing. *See* 18 U.S.C. § 3553(a). Martinez' challenge is simply a disagreement with the court's balancing of the § 3553(a) factors and does not show an abuse of discretion.

AFFIRMED.